A

DATO' SERI DR KOK MEW SOON & ORS

v.

MUSTAPHA MOHAMED & ORS

B

HIGH COURT MALAYA, KUANTAN
SURAYA OTHMAN J
[SUIT NO: 22-100-2007]
3 DECEMBER 2007

C ***CIVIL PROCEDURE:*** *Injunction - Injunction to restrain Danaharta enforcing rights under settlement agreement - Whether court barred from granting injunction - Section 72(a) Pengurusan Danaharta National Berhad Act 1998 - Whether prohibition in s. 72 extends to receivers and managers appointed by Danaharta as their agents - Purposive*
D *interpretation to be applied to ss. 66 and 72 - Receivers and managers to be accorded same immunity and protection as are given to Danaharta*

Multi-Purpose Bank Bhd and Bangkok Bank Berhad had granted credit facilities under a Facility Agreement to FDN Sdn Bhd
E ('FDN') guaranteed by the 1st, 2nd and 3rd plaintiffs. FDN defaulted its obligations under the said Facility Agreement. Subsequently, Pengurusan Danaharta Nasional Bhd ('Danaharta') acquired from the said banks by way of statutory vesting the Facility Agreements and related securities and guarantees pursuant
F to the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998 ('Act'). Pursuant to negotiations to restructure the loans, Danaharta agreed to accept settlement of a reduced amount of RM39 million provided the said sum was paid on or before 20 December 2004. However, despite repeated demands, FDN failed
G to settle its outstanding payment to Danaharta. This constituted an event of default under section 6.01 of the Debentures and consequently, Danaharta appointed the 1st and 2nd defendants as receivers and managers over FDN. The plaintiffs applied for an interim injunction against the 1st and 2nd defendants to prevent
H them from exercising and acting as the receivers and managers of FDN Sdn Bhd and against the 3rd defendant to prevent it from appointing any receivers and managers for FDN Sdn Bhd. The issues arising were whether the court can grant an injunction order against Danaharta and against the 1st and 2nd defendants
I as receivers and managers of FDN.

Held (dismissing with cost the application for interim injunction):

(1) According to s. 72(a) of the Act the court is prohibited from granting an injunction order against Danaharta as a corporation. The 1st and 2nd defendants as receivers and managers could be equated as special administrators as they were appointed by Danaharta as its agents and were acting pursuant to their power as provided under the Act. As such they were protected from liability against any action or proceeding in a court of law for any loss or damage while exercising their function and power in good faith. (paras 16 & 23)

(2) To give effect to the true intention of the Act, the purposive approach was applied to ss. 66 and 72 of the Act to include receivers and managers as they are agents of Danaharta. Though they are not specifically mentioned in ss. 66 and 72 of the Act, by implication, receivers and managers should also be accorded the same immunity and protection as are given to Danaharta, oversight committee, special administrator or independent advisor. As such no injunction can be taken against them. (paras 34 & 35)

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Northman v. Barnett Council [1978] WLR 221 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal [2004] 2 CLJ 265 FC ***(refd)***

Pengurusan Danaharta National Berhad v. Tang Kwor Ham & Ors [2007] 4 CLJ 513 FC ***(refd)***

See Teow Chuan & Anor v. Dato' Anthony See Teow Guan [2006] 2 CLJ 292 CA ***(refd)***

Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 HC ***(refd)***

Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Ors [2007] 3 CLJ 230 CA ***(refd)***

United Hokkien Cemetries Penang v. The Board, Majlis Perbandaran Pulau Pinang [1972] 2 MLJ 121 ***(refd)***

Wong Pot Heng v. Hj Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 17A
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 3, 66, 72(a)
Rules of the High Court 1980, O. 29

Other source(s) referred to:
Siti Naaishah Hambali & Hasani Mohd Ali, *The Role Of Pengurusan Danaharta Nasional Berhad In Corporate Restructuring*, [2000] 4 CLJ i

For the plaintiffs/appellants - Christopher Lai King Lung (Yap Khing Hwa with him); M/s Chris Lai, Yap & Partners
For the defendants/respondents - V Vijakumar; M/s Albar & Partners
Tommy Thomas; M/s Tommy Thomas

Reported by Amutha Suppayah

JUDGMENT

Suraya Othman J:

Introduction

[1] The appellants/plaintiffs, Dato' Seri Dr Kok Mew Soon (1st plaintiff), Kok Ban Fook (2nd plaintiff), Kok Woon (3rd plaintiff), FDN SDN BHD (4th plaintiff) filed an appeal against the decision of this court which dismissed with cost the application by summons in chambers encl. 3 ("the application") by appellants for an interim injunction order under O. 29 Rules of the High Court 1980 against the 1st and 2nd respondents/defendants (Mustapha bin Mohamed and Jayaraj a/l Retnaswamy) to prevent them from exercising and acting as the Receivers and Managers of FDN Sdn Bhd and against the 3rd respondent/defendant (Pengurusan Danaharta Nasional Berhad) to prevent them from appointing any Receiver and Manager for FDN Sdn Bhd. The reason for dismissing the application is as set forth.

Facts And Background

[2] On July 1996, Multi-Purpose Bank Bhd and Bangkok Bank Berhad (the banks) granted credit facilities to FDN by facility agreements dated 18 July 1996 and 19 August 1996, Security Sharing Agreements dated 18 July 1996 and 19 August 1996, debentures dated 19 August 1996, guarantees dated 19 August 1996 entered between Multi-Purpose Bank Bhd and Bangkok Bank Berhad and the 1st, 2nd and 3rd plaintiffs and charges dated 20 July 1996 and 21 August 1996.

[3] At all the material times, FDN Sdn Bhd ("FDN") was in default of its obligations under the said facility agreement to the banks, and was thus a non performing loan. On 29 April 1999, Pengurusan Danaharta Nasional Bhd ("Danaharta") acquired from the banks by way of statutory vesting the Facility Agreements, Security Sharing Agreements, debentures, Guarantee and Charges pursuant to the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) ("Danaharta Act").

[4] On 23 June 1999, 2 vesting certificates were issued by Danaharta whereby the credit facilities extended by the banks to FDN were statutorily vested in Danaharta from 29 April 1999. As a result of the issuance of the vesting certificates, the credit facilities were transferred from the banks to Danaharta, with the result that Danaharta took over all the rights and obligations of the banks under the credit facilities, including the agreements therein. In consequence, FDN's creditor from 29 April 1999 is Danaharta and no longer the banks.

[5] Negotiations were thereafter conducted between Danaharta and FDN to restructure the non-performing loans under the credit facilities, which led to the execution of a letter of agreement dated 19 June 2002, which was accepted by FDN and the guarantors on 23 July 2002. According to the letter of agreement, the amount due and owing by FDN to Danaharta as at 31 May 2002 was RM45,283,995.43 which FDN agreed to settle by 1 June 2005.

[6] By a Loan Restructing Agreement dated 25 July 2003 entered into between Danaharta and FDN, FDN admitted that, as at 30 June 2003, its outstanding totaled to RM44,493,344.05. Under the Loan Restructing Agreement, the parties agreed to convert all the credit facilities vested in Danaharta into a single term loan which FDN agreed to fully settle by 30 June 2005.

[7] By a further letter of agreement dated 23 August 2004, Danaharta agreed to accept settlement for the reduced amount of RM39 million in respect of FDN's outstanding of RM40,685,600.55 as at 31 June 2004 provided full payment of the "discounted" amount of RM39 million was received on or before 20 December 2004, failing which the outstanding amount originally due and owing would become payable.

[8] By letter dated 25 November 2004, Danaharta gave notice and reminded FDN that FDN's total outstanding amount of RM37,737,530.05 due on 20 December 2004 was required to be paid by that date.

[9] By letter dated 23 December 2004, Danaharta informed FDN that it had defaulted in its repayment amounting to RM37,737,530.05 which was due on or before 20 December 2004.

[10] By letters dated 28 July 2006, Danaharta's solicitors demanded from FDN and its guarantors its outstanding which had increased to RM54,701,018.76 as at 30 June 2006, failing which legal proceedings would be commenced against them.

[11] Despite repeated demands, FDN had failed to settle its outstanding payment to Danaharta. Such a breach of contract on FDN's part constitutes an event of default under section 6.01 of the Debentures dated 19 August 1996. Consequently, Danaharta in exercising its power under section 8.01 (c) appointed the 1st and 2nd defendants as receivers and managers over FDN on 18 June 2007.

[12] As secured creditor under the debentures for all the assets and properties that FDN had charged to Danaharta under the floating charge in the debentures, Danaharta takes priority over all the alleged unsecured creditors of FDN.

Grounds Of Judgment

[13] The issues to be determined by this court are as follows:

(a) Whether the court can grant an injunction order against Danaharta (3rd defendant);

(b) Whether the court can grant an injunction order against 1st and 2nd defendants as receivers and managers of FDN.

[14] In 1998 as a result of the economic and financial crisis, Danaharta was established under Danaharta Act. Danaharta was incorporated under s. 3 of the Danaharta Act with the principle objective of carrying on business as an asset management company with powers to acquire, manage, finance and dispose of assets and liabilities "belonging" to financially distressed companies

which had been charged, pledged or otherwise. As stated in the Preamble to the Danaharta Act it was enacted to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the corporation and for matters connected therewith or incidental thereto.

[15] The Danaharta principal objective is stated in the First Recital to the Danaharta Act that, as an asset management public corporation, it is required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalization of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities.

[16] According to the s. 72(a) of the Danaharta Act 1998 the court is prohibited from granting an injunction order against Danaharta as a corporation. Section 72 of the Danaharta Act 1998 provides as follows:

> **Limit on the grant of orders of court**
>
> 72. Notwithstanding any law, an order of a court cannot be granted:
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,
>
> and any such order if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

[17] The Federal Courts has held that no injunction can lie against Danaharta when exercising its power under the Danaharta Act. This is cited in the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn. Bhd.* [2004] 2 MLJ 257 and *Pengurusan Danaharta National Berhad v. Tang Kwor Ham & Ors* [2007] 4 CLJ 513.

[18] In the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* it was held by the Federal Court that there was a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional. These are cited in p. 257 to 258 of the case as follows:

> (1) Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximize recovery values.
>
> (2) In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facility by way of statutory vesting; to manage the affairs of corporate borrowers through special administrators appointed to formulate workout plans in order to repay debts owing to creditors, and finally to dispose of charged assets. Thus insofar as disposition of assets was concerned the appellant was given additional power to sell charged lands by private treaty, without securing the usual court order as banks and other secured lenders are obliged to do so under National Land Code.
>
> (4) The conclusion of the Court of Appeal was therefore wholly unsustainable as it was a total deviation from the law regulating art 8(1). It was therefore the Federal Court Judges' unanimous view that there was a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional.

[19] In the case of *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513 the primary issue for determination before the Federal Court was whether s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ousted the jurisdiction of the court in application for judicial

review against the first appellant (Pengurusan Danaharta Nasional Bhd). Abdul Hamid Mohamad FCJ, Alauddin Mohd Sheriff FCJ, Abdul Aziz Mohamad FCJ in allowing the appeals held as follows:

> (1) Although the authorities dealt with applications for injunction, the principles therein were equally applicable to *certiorari* and *mandamus* applications. Therefore, in the present case judicial review by way of *certiorari* was not available by reason of section 72 of the Act. Section 72 clearly prohibits an order of court which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special Administrators or Independent Advisors under the Act. Following the Federal Court decision in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*, section 72 is valid and constitutional and any order that denies the quick and efficient disposal of property within the framework of the Act is void. Hence, the orders of the Court of Appeal ran foul of section 72 of the Act and were unsustainable.

[20] In the case of *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 the provision of s. 72 was also considered. In refusing an application for an injunction the learned judge, Vincent Ng J, commented:

> It is incontrovertible that section 72 constituted a caveat against the granting of a restraining order directed at the courts ... Thus, in the present case, I would hold that this court is precluded by the expressed crystal clear provision in s. 72 from granting the injunction or restraining order sought by the plaintiff.

[21] The operation of Danaharta and the role of the Special Administrators are briefly discussed in the article of *"The Role Of Pengurusan Danaharta Nasional Berhad In Corporate Restructuring"* [2000] 4 CLJ i by Siti Naaishah Hambali and Hasani Mohd Ali; lecturers of Law Faculty Universiti Kebangsaan Malaysia. The operation of Danaharta are described as follows:

> On acquiring the Non Performing Loans, Danaharta will classify them into viable and non-viable one. Loan management strategies will be applied on the viable ones by applying one or more of the following ie, the rescheduling of loan repayments, debt equity conversions and restructuring *via* the appointment of **Special Administrators or receivers and managers,** or by a s. 176 scheme. In the case of non-viable loans, asset management strategies will be applied. Danaharta will then examine the status of these companies. If they are of some value, Danaharta will

A appoint Special Administrators to manage them before going into the process of foreclosure. The appointment of Special Administrators indirectly will give the debtor company a second chance for its loan to be treated as a viable loan. (emphasis added)

B **[22]** As for the function and the role of the Special Administrators, it is are also widely discussed in the article as follows:

Legally, Danaharta is empowered to appoint Special Administrators in applying any of its strategies. Such power is conferred in order C to manage the affairs of distressed companies. This power has been regarded as special power which is statutorily provided for special purposes. The burden imposed on Special Administrators is very heavy as their main function is to nurse the distressed companies which had failed to recover through the first rehabilitation effort mentioned earlier. Section 25 of Danaharta Act D provides that the objective of appointing a Special Administrator is to fulfill a public interest, or to ensure continued survival of the company as an ongoing concern and to achieve a better return for the creditors than what they would receive should the company be wound up. The Special Administrators will take over the E control and management of the assets and affairs of the corporate borrower. Here, the Special Administrators will play an active role by preparing a workout proposal. The Special Administrators as an independent person should act impartially in exercising its powers without inclining itself towards the interests of any party. The Special Administrators is also expected to introduce new F ideas, new management skills and dynamic proposals to speed up the process of recovery of an ailing debtor company. Danaharta acts as a safeguard to creditors by carefully examining the proposal prepared by the Special Administrators for approval. Even such proposal is only submitted to Danaharta after being G approved by the majority votes in value of secured creditors.

[23] Therefore from the cases above it is clear that no injunction can be taken against Danaharta. But what about managers and receivers? Can they be equated or given the same standing as special administrators? This court feels that the 1st and 2nd H defendants as receivers and managers can be equated as special administrators as they are appointed by Danaharta as their agents and acting pursuant to their power as provided under the Danaharta Act. As such they are protected from liability against any action or proceeding in a court of law for any loss or damage I while exercising their function and power in good faith. This is provided in s. 66 of the Danaharta Act which state as follows:

Immunity

66. (1) The Corporation, any member of the Board, any member of the Oversight Committee, and any employee or **agent** of the Corporation shall not be liable to be sued in any Court for loss or damages for or on account of, or in respect of any act or matter done or ordered to be done or omitted to be done by him in good faith and in the intended exercise of any power or discharge of any duty conferred on him or it under this Act. (emphasis added)

(2) A Special Administrator or an Independent Advisor appointed under this Act shall not be liable to any action or other proceedings in a Court by any party for any loss or damage caused by any act or matter done or statement made or omitted to be done by him in good faith and in the intended exercise of any function or power, conferred or imposed on him under this Act except where such loss or damage is due to the willful misconduct or gross negligence of the Special Administrator or the Independent Advisor, as the case may be.

[24] As can be seen, agents of Danaharta, like the special administrators are equally protected and given the same immunity under s. 66 of the Act.

[25] In coming to the conclusion that receivers and managers should be equated to special administrators, this court refers to s. 17A of the Interpretation Acts 1948 and 1967 (Act 388). This section is what is normally referred to as the "purposive approach" in statutory interpretation. Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) provides:

Regard to be had to the purpose of Act

17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[26] Applying the purposive approach to s. 72 of the Danaharta Act 1998, it should also include receivers and managers as they are the agents for Danaharta. Though s. 72 of the Act does not specifically mention the word receiver and manager, by implication, a receiver and manager should also have the same immunity as accorded to a special administrator or an independent advisor and

A therefore protected against any legal action such as injunction. This is so, since the receivers and managers are appointed by Danaharta as their agents and acted on Danaharta's behalf.

[27] The application of the purposive approach rules were B adopted in many cases to give effect to the intention of Parliament.

[28] In *Northman v. Barnett Council* [1978] WLR 221, Lord Denning MR stated (at p. 228):

C > In all cases now in the interpretation of statues, we adopt such a construction that will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an D absurd and unjust situation, the judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind.

[29] In *United Hokkien Cemetries Penang v. The Board, Majlis* E *Perbandaran Pulau Pinang* [1972] 2 MLJ 121 Chang Ming Tat J, as he then was, said:

> The literal method of construction is now completely out of date and has been replaced by a 'purposive approach'. It ought to be noted that this purposive approach is not a modern fashion. Since F the 17th century, it has been the task of the judiciary to interpret an Act "according to the intent of them that made it".

[30] In *Wong Pot Heng v. Hj. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312, Mohamed Azmi SCJ G commented that:

> The purposive construction of statues was first adopted by the House of Lords in *Fothergill v. Monarch Airlines* [1980] 3 WLR 221. It is a well established principle that the purposive approach to the interpretation of legislation only applies where any doubt H arises from the terms of words employed by the legislature. But where the words are precise and unambiguous, then the literal and strict construction rule should apply.

[31] In the case of *Palm Oil Research And Development Board* I *Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2004] 2 CLJ 265 the issue was whether or not:

(1) Whether the Palm Oil Research and Development Act 1979, is a taxing statute; A

(2) If the answer is in the affirmative, then what interpretation/ approach should betaken.

Steve Shim CJ (Sabah & Sarawak), Haidar CJ (Malaya) stated as follows: B

> Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statutes. C

[32] In the case of *Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Ors* [2007] 3 CLJ 230 it was held that:

> With rule 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('Practice and Etiquette Rules') now giving 'an appearance of inconsistency' with, say, rule 11 or section 116 of the Legal Profession Act 1976, a purposive interpretation must be given in the circumstances of the case that does not detract from the spirit of the Practice and Etiquette Rules and intention of Parliament. It is understood that the Practice and Etiquette Rules was formulated to regulate the conduct of the legal profession, and to ensure that good legal ethics are abound in this profession, and not unwittingly to kill off this honourable profession. Unless a purposive interpretation is given bizarre and absurd results could ensue. D E F

[33] Refer also to the case of *See Teow Chuan & Anor v. Dato' Anthony See Teow Guan* [2006] 2 CLJ 292 which stated that:

> In interpreting section 126 of the Evidence Act, the court are required to give a purposive approach and a construction that would promote the purpose or object underlying the Act (see para 25). Where the communications with the solicitor is not intended to be confidential, the privilege under section 126 of the Act will not apply (see para 32). The element of confidentiality is an essential requirement in section 126. G H

Conclusion

[34] To give effect to the true intention of the Danaharta Act 1998, the purposive approach is adopted. In this context, the purposive approach is applied to ss. 66 and 72 of the Danaharta Act to include receivers and managers as they are agents of Danaharta. Though as stated before, they are not specifically I

mentioned in ss. 66 and 72 of the Act, however, by implication, receivers and managers should also be accorded the same immunity and protection as are given to Danaharta, oversight committee, special administrator or independent advisor.

[35] As such no injunction can be taken against them. In that light, the summons in chambers, encl. 3 by the appellants for an interim injunction against 1st and 2nd defendants as receivers and managers and the 3rd defendants, Danaharta as a corporation is dismissed with cost.